No. 14-8358

In the

Supreme Court of the United States

Avondale Lockhart,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

Reply Brief for Petitioner

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Preliminary Statement

The courts of appeals have split sharply over the question presented, namely, whether a prior state conviction must involve a minor to trigger the enhanced sentencing ranges in 18 U.S.C. § 2252(b)(2) and similar penalty provisions. Respondent does not dispute that the Eighth Circuit, alone among the circuits, has always insisted on evidence of a minor victim before applying the enhancements at issue. Nor does respondent dispute that this petition offers a clean vehicle to resolve this pure question of statutory interpretation. Instead, respondent muddies the waters, suggesting that the Eighth Circuit has been less than unequivocal (it hasn't) and might depart from its consistent line of precedents in a hypothetical future case (it won't). Neither contention counsels against review. Certiorari should be granted to resolve this acknowledged split and bring uniformity to the imposition of these severe mandatory minimum punishments.

Argument

A. The decision below deepens the circuit split over whether a prior state conviction must involve a minor to trigger the § 2252(b)(2) enhancement.

Petitioner has identified a five-to-one split on the question presented. The Second, Fourth, Fifth, Sixth, and Ninth Circuits all hold that a state conviction relating to "aggravated sexual abuse" or "sexual abuse" need not involve a minor to trigger the sentencing enhancements in § 2252(b)(2) and similar provisions. In sharp contrast, the Eighth Circuit has repeatedly required that any prior state

conviction involve a minor to qualify as a § 2252(b)(2) predicate. That conflict warrants review.

In multiple published decisions over the past decade, the Eighth Circuit, when confronted with prior state convictions that relate to "aggravated sexual abuse" or "sexual abuse," has insisted on evidence—from charging documents, the defendant's assent, or comparable sources—that these offenses have involved minors. *See United States v. Linngren*, 652 F.3d 868, 870 (8th Cir. 2011); *United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007); *United States v. Weis*, 487 F.3d 1148, 1152 (8th Cir. 2007); *United States v. Trogdon*, 339 F.3d 620, 621 (8th Cir. 2003). In the face of these decisions, respondent argues that the Eighth Circuit "has not squarely addressed" the question presented because, in each of these cases, the Eighth Circuit concluded that a minor was involved. BIO 17.

Respondent's observation diminishes neither the starkness of the split nor the need for this Court's intervention. The Eighth Circuit would not have undertaken to review the records underlying the prior state convictions in any of these cases if it had not deemed that task compelled by the text of the statutory enhancements. Embracing respondent's interpretation of the statutory text would have offered a far simpler path to affirmance and avoided contentious questions regarding which record materials were properly considered in the inquiry. *Cf. Linngren*, 652 F.3d at 872 (Bye, J., dissenting) (criticizing panel majority for relying on probable cause portion of state criminal complaint). Indeed, in *Linngren*,

respondent conceded that a prior state offense must involve a minor to trigger the § 2252(b)(1) enhancement. *See* Position of the Government with Respect to Sentencing 3, *United States v. Linngren*, No. 09 Cr. 259 (D. Minn. March 3, 2010), ECF No. 38 ("The statute is over-inclusive under the categorical approach with regards to whether such a conviction qualifies as sexual abuse of a minor ... (i.e. the Minnesota statute is silent on the age of the victim)."). The conclusion is inescapable. The Eighth Circuit has always asked whether a prior state conviction involves a minor because the court does not believe that the enhancements apply otherwise.[1]

Respondent, in essence, argues for further percolation, speculating that "the Eighth Circuit would not likely view *Hunter* and *Linngren* as foreclosing the court from adopting the government's view of the statute" in a "future case." BIO 17–18. That hypothetical future case may never arrive. Because the Eight Circuit has always demanded evidence that a prior conviction involve a minor, AUSAs within that jurisdiction appear not to seek, and district courts appear not to apply, the

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[1] Respondent suggests that *Weis* and *Trogdon* shed little light on the Eighth Circuit's position because "those cases ... considered only whether the prior offenses were 'conviction[s] relating to ... abusive sexual conduct involving a minor,' the category of state law offenses that both parties agree must involve a minor victim." BIO 17 n.2. The Eighth Circuit has never adopted the sharp distinction among state-law predicates that respondent proposes and other circuits have embraced, but has instead treated the categories of "sexual abuse" and "abusive sexual conduct" as interchangeable. *See, e.g.*, *Weis*, 487 F.3d at 1152 (noting that mens rea of defendant's prior "demonstrates the offense is one 'relating to' sexual abuse"); *Linngren*, 652 F.3d at 873 (Bye, J., dissenting) (describing *Weis* as "holding [that] defendant's prior conviction for assault related to sexual abuse of a minor").

enhancements in cases lacking such proof. For the same reason, respondent's observation that petitioner "identifies no case in which a court has declined to apply Section 2252(b)(2) ... on the ground that the defendant's prior state sexual abuse conviction involved an adult victim," BIO 18, is beside the point. Respondent has identified no Eighth Circuit case going the other way either, nor any case in which it has even pursued the enhancement against a defendant convicted of sexual abuse of an adult. Rather, the unbroken line of decisions requiring a minor victim, from *Trogdon* through *Linngren*, has presumably dissuaded Eighth Circuit AUSAs from seeking these enhancements except in the circumstances contemplated by circuit precedent. This Court ought not abstain from resolving a ripe split in anticipation of a circuit course-correction unlikely to ever come.

B. The decision below is wrong.

On the merits, petitioner has explained why the Second Circuit's decision below ignores the most natural reading of the statutory text, as illuminated by the series qualifier canon. Respondent, echoing the decision below, counters that petitioner's reading—under which "involving a minor or ward" modifies "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact"—"would render some of the statutory language superfluous." BIO 10. That is so, respondent contends, because "the term 'abusive sexual contact involving a minor' would seemingly encompass all conduct that constitutes 'sexual abuse involving a minor' and 'aggravated sexual abuse involving a minor.'" BIO 10–11.

Of course, this Court ordinarily construes statutes to avoid superfluity. But that principle is not decisive here because § 2252(b)(2) contains surplusage even on respondent's reading. Specifically, on respondent's interpretation, "aggravated sexual abuse" does no independent work, because all "aggravated sexual abuse" is necessarily "sexual abuse" as well. Granting that § 2252(b)(2) contains redundancy—a conclusion fortified by the clause punishing the "production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography"—the more reasonable reading is that Congress used overlapping terms to emphasize its intent to cover a broad continuum of punishable conduct. *See, e.g., Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting) (noting that canon against superfluity should not be applied "to the obvious instances of iteration to which lawyers, alas, are particularly addicted," and concluding that statutory phrase "'falsely made, forged, altered, or counterfeited' is self-evidently not a listing of differing and precisely calibrated items, but a collection of near synonyms which describes the general crime of forgery").

Congress made the deliberate choice to emphasize the breadth of abuse of children it intended to encompass by including three forms of such abuse and offenses "relating to" them. Where overlapping terms manifest Congress's intent to capture a wide range of behavior, this Court treats those terms as an integrated unit, with any final modifier applied to the whole, per the series qualifier canon. *See, e.g., United States v. Bass*, 404 U.S. 336, 337 (1971) (applying canon to

statutory phrase "receives, possesses, or transports in commerce or affecting commerce").

Respondent also notes that "[m]any of the crimes identified in" the enhancement provisions at issue "can have adult victims, and there is 'no logical reason that Congress would have identified federal offenses not involving minor victims as qualifying predicates while excluding state offenses that criminalize identical conduct." BIO 12 (quoting *United States v. Mateen*, 764 F.3d 627, 631–32 (6th Cir. 2014) (en banc)). Petitioner has already explained (Pet. 29–31) that the plain text of the penalty provisions demonstrate Congress's intent to achieve just this result, and respondent properly concedes as much. *See* BIO 12 (Section 2252(b)(2) "does not identify a state-law offense corresponding to every federal crime that triggers the ten-year statutory minimum sentence"). For good measure, there is a perfectly logical explanation for Congress's choice: Congress knew what conduct it was capturing under federal sexual abuse law and was confident that all covered offenses were proper predicates. Because Congress did not have the same familiarity with the sexual abuse laws of all 50 states, it adopted a floor: qualifying offenses must not only have been sexual and abusive but, consistent with the offenses punishable under §§ 2251, 2252, and 2252A, must have involved children.[2]

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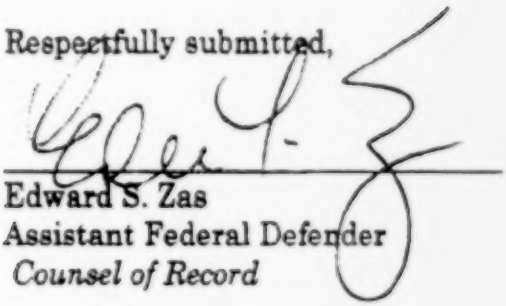
[2] Respondent also points out the "striking similarity" between the terms "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact" and the federal offenses listed at §§ 2241–43, contending that the former track the latter. BIO 12–13. Respondent neglects to mention that the courts of appeals—including several on the majority side of the split implicated here—have concluded that the terms "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" in

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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the enhancement provisions do not incorporate the definitions of the §§ 2241–43 offenses. *See, e.g., United States v. Barker*, 723 F.3d 315, 322–23 (2d Cir. 2013); *United States v. Sinerius*, 504 F.3d 737, 742–43 (9th Cir. 2007); *United States v. Hubbard* , 480 F.3d 341, 348 (5th Cir. 2007).